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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-963

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
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v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Transcontinental Gas Pipe Line Corporation (Transco) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 6, 1979.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported at 589 F.2d 186 (5th Cir. 1979) and appears in Appendix A, *infra* at pp. 1a-12a. Its order denying clarification

and rehearing, entered on September 20, 1979 is not reported and appears in Appendix B, *infra* at p. 13a.

The following orders of the Federal Power Commission and Federal Energy Regulatory Commission[1] are not reported and appear at Appendices C, D and E *infra* at pp. 15a-21a, 23a, and 25a-32a, respectively: (1) "Findings and Order After Statutory Hearing Issuing Certificate of Public Convenience and Necessity," issued on September 28, 1977, (2) "Errata Notice," issued on December 7, 1977, and (3) "Order Denying Application for Rehearing," issued on December 30, 1977.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 6, 1979. A timely petition for rehearing was denied on September 20, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, in the process of authorizing the construction and operation of natural gas pipeline facilities upon the necessary determination under Section 7 of

[1] On October 1, 1977, pursuant to Section 402 of the Department of Energy Organization Act, Pub. L. No. 95-91, § 402, 91 Stat. 583 (1977) and Executive Order No. 12,009, 3 C.F.R. 142 (1978) the Federal Power Commission (FPC) ceased to exist and its functions and regulatory responsibilities were transferred to the Federal Energy Regulatory Commission (FERC). As used in this petition, the term "Commission" refers to either the FPC or the FERC as the context requires.

the Natural Gas Act (Act) that such facilities are "required by the present or future public convenience and necessity," the Commission may use its power to attach "reasonable terms and conditions" to the certificate in such a way as inevitably to deprive the pipeline company of the ability to recover from its customers the cost of such pipeline facilities.

STATUTORY PROVISIONS AND REGULATION INVOLVED

Section 7(c) of the Natural Gas Act, 52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942) 15 U.S.C. § 717f(c), is set forth in Appendix F, *infra* at pp. 33a-34a.

Section 7(e) of the Natural Gas Act, 56 Stat. 84 (1942), 15 U.S.C. § 717f(e), is set forth in Appendix F, *infra* at p. 34a.

Section 2.65 of the Commission's Statements of General Policy and Interpretations, 18 C.F.R. § 2.65, is set forth in Appendix G, *infra* at pp. 35a-36a.

STATEMENT OF THE CASE

Background

Transco is one of the major interstate natural gas pipeline systems in the United States, and is subject to regulation by the Commission under the Natural Gas Act. Transco owns and operates extensive pipeline facilities which gather natural gas from numerous sources in its supply area in the Gulf Coast, both onshore and offshore, and transport the natural gas to markets primarily in the mid-Atlantic region from Atlanta to New York City.

Because natural gas is a non-renewable energy resource and individual gas fields are necessarily being depleted over time, gas pipeline companies are constantly seeking to acquire and attach new gas fields as replacements for the depleting fields. During the approximately 30 years of its existence, Transco has constructed numerous pipeline supply laterals in its Gulf Coast supply region as a part of the on-going process of attaching new gas fields to its system. Transco presently has more than 225 fields attached to its system.

In mid-1977, Transco applied for authorization to construct and operate a major extension of one of its gas gathering pipelines in the offshore Louisiana area in order to attach new production from five offshore lease blocks. The cost of the pipeline extension was projected to be $52,000,000.

With respect to a pipeline construction project to connect new fields, the capacity of the facilities must bear a reasonable relationship to the projected gas supplies. In that regard, in carrying out its licensing responsibilities under Section 7 of the Act,[2] the Commission is required to scrutinize the adequacy of the estimated total proved natural gas reserves and daily delivery rate in comparison to the maximum daily

[2] This Court has quoted with approval the legislative history of Sections 7(c) and (e) which explained that such sections were intended to give "the Commission *an opportunity to scrutinize* the financial set-up, *the adequacy of gas reserves, the feasibility and adequacy of the proposed services . . . at a time when such vital matters can readily be modified as the public interest may demand.*" *F.P.C.* v. *Hunt*, 376 U.S. 515, 525 (1964) (emphasis added), quoting House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1290, 77th Cong., 1st Sess., 2-3, U.S. Code Congressional Service 1942, p. 188.

capacity of the facilities.[3] In this case, Transco's application reflected its estimate, based on the latest available drilling information, that the five specified lease blocks would deliver a daily average quantity of 157,400 Mcf[4] during the second year of operation, which estimated quantity equates to about 65% of the 240,475 Mcf maximum daily capacity of the proposed facilities. The application also reflected that estimated utilization would increase to about 80% in the third year, but would decline to only 38% in the fifth year due to the projected fall-off in deliveries as the fields are produced.[5]

The 60 Percent Load Factor Condition

Since there was no opposition to Transco's application, the Commission accepted the validity of the application and exhibits in an abbreviated hearing and

[3] Applications pursuant to Section 7 for authority to construct new facilities must contain information concerning the throughput capacity of the facilities as well as the amount of projected gas supplies. 18 C.F.R. § 157.14. Also, an applicant normally is asked to furnish to the Commission's staff all workpapers and data concerning the claimed gas reserves, so that staff can perform an independent evaluation to assist the Commission in exercising its expertise.

[4] An "Mcf" denotes 1,000 cubic feet of gas. The quantities shown in Transco's application included its own purchase quantities as well as the quantities to be purchased by three other pipelines and transported by Transco.

[5] Typically, any new gas supply facility connecting more than one new field will undergo a build-up period after the date of initial gas deliveries, will achieve a peak utilization within a short period, and then will decline in utilization as the deliveries from gas fields decline and the fields approach depletion. As discussed at p. 10, *infra*, the period between initial deliveries and depletion in many of the newer Gulf Coast fields is now only 5 to 7 years, or a substantially shorter period than heretofore experienced.

issued a certificate authorizing the construction and operation of the proposed facilities. Appendix C, *infra*. This authorization, however, contained a condition that Transco must comply with Section 2.65(b) of the Commission's Statements of General Policy and Interpretations. This section contains the so-called "60 percent load factor" rate condition, which is the condition here in issue.

Section 2.65 was issued in 1968 as a general statement of Commission policy[6] at a time when the Outer Continental Shelf area, offshore Louisiana, was undergoing development as a major source of new natural gas reserves. The stated purpose of Section 2.65 was to discourage duplicative gas pipeline facilities and to promote maximum economies of scale through joint utilization of large diameter pipeline extensions into the offshore area. At the time authority for the construction of offshore facilities is sought, Section 2.65 (a)(4) requires the applicant to demonstrate that by the end of the 12-month period following installation, the proposed facilities will be utilized to at least 60% of the annual capacity available, unless the requirement for such a showing is waived. In essence, the regulations set up a specific standard for the required relationship between the maximum capacity of the proposed pipeline and the projected deliveries from the new gas supply sources.[7]

[6] "Policy With Respect to the Issuance of Certificates of Public Convenience and Necessity to Pipeline Companies in the Southern Louisiana Off-Shore Area." Order No. 363, 39 FPC 925 (1968).

[7] Transco does *not* challenge that part of Section 2.65(a)(4) which requires an applicant to demonstrate facility utilization of at least 60% in the second year of operation. Indeed, Transco's application satisfied such showing. It is the rate penalty of Section 2.65(b) which is challenged as unlawful.

In addition, however, Section 2.65(b) provides in effect that the pipeline will suffer a rate penalty at such time as the annual utilization of the pipeline is less than 60% of its capacity. As correctly stated by the court of appeals, "the import of this condition in the certificate is a requirement that Transco operate the pipeline at 60% capacity or be unable to recover part of its costs." Appendix A at p. 3a.

As the court of appeals also recognized, the reasonable literal reading of Section 2.65(a)(4) is that it provides a one-time test, *i.e.*, it permits a one-year start-up period to be followed by the required minimum 60% utilization in the next year only. *Id.* at p. 4a. Such an interpretation of the condition as a one-time test is consistent with the Commission's discussion of the rule in its 1968 order where it spoke of the 60% minimum load factor being "met" or being "achieve[d]" within the prescribed time period. 40 FPC 160, 161-62 (1968). And, for the first seven years of the rule's existence, there was no indication that anything other than a one-time test was contemplated.

In 1975, the Commission announced for the first time that it considered the 60% rate condition to be an ongoing or perpetual test.[8] At the same time, however, the

[8] In *Trunkline Gas Company*, 54 FPC 1087, 1092-93 (1975), the Commission stated:

> A single resolution of the 60 percent load factor condition is not what is intended by the language of paragraph "A(4)." The policy of Section 2.65 is intended to be one of continuing applicability and paragraph "A(4)" reflects that policy objective. The Commission recognizes that all offshore facilities may not be connected to unlimited supplies of gas which will enable the facilities to be operated at a 60 percent load factor in perpetuity; however, when the time comes that any particular facility may be limited in the supply of gas available to it, the Commission will consider the merits of modifying the 60 percent requirement.

Commission recognized that such a perpetual test would be impossible to satisfy, and it indicated that it would "consider" modifying the requirement at such time as deliveries dropped below that level.

Transco was issued numerous offshore construction certificates after the Commission's promulgation of the 60% policy in 1968, but it was not until 1977 that the condition was first included in a Transco certificate. In the instant case, Transco constructed the pipeline but protested on rehearing the imposition of the 60% rate condition. Rehearing was denied. Appendix E, *infra*.

Transco sought review in the Court of Appeals for the Fifth Circuit. The court determined that the orders were reviewable, and then ruled in the Commission's favor on the merits of the 60% condition. Appendix A, *infra*. Transco sought rehearing or clarification, which was denied. Appendix B, *infra*.

REASONS FOR GRANTING THE WRIT

1. This Case Presents An Important Question Concerning Whether, By Exercise Of Its Power To Impose Conditions On Certificates, The Commission Can Deny A Pipeline The Opportunity To Recover In Rates Its Prudent Costs Expended Pursuant To The Certificate Authorization

In this case, the Commission has determined that the pipeline facilities constructed by Transco are required by the public convenience and necessity, and there is no dispute that Transco's expenditures under the certificate were prudent. Under the Commission's interpretation of the 60% condition as a perpetual test, the only unanswered question is *at what time* the rate penalty will take effect.[9] The Commission has gone beyond a threat of possible cost disallowance; it has mandated that result. Thus, a clear-cut case is presented as to whether the Commission, in the exercise of its conditioning authority under Section 7(e) to impose "such reasonable terms and conditions as the public convenience and necessity may require," can lawfully deprive Transco of the opportunity to recover from its customers its prudently incurred costs, which opportunity is guaranteed by Sections 4 and 5 of the Act and the Constitution.

Transco respectfully submits that such a result is unlawful. Although this Court has held that the Commission has broad conditioning authority under Section 7 of the Act (see Section 2 *infra*), it has never sanctioned the use of that authority as a means for the Commission to avoid its affirmative responsibility to determine the public convenience and necessity, or as a weapon to do indirectly under Section 7 what it would be forbidden to do under its ratemaking authority under Sections 4 and 5 of the Act.

It is clear that resolution of this question will have far-reaching consequences for the gas pipeline industry and, consequently, for the prospects for development of domestic energy sources. Permitting a regulatory agency to use its licensing powers to preclude pipelines from recovering their costs will have a definite chilling effect not only on the willingness of pipelines to construct new facilities, but also on the willingness

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[9] As noted above, Transco's application reflected that deliveries from the five lease blocks were anticipated to decline to the point that by the fifth year of operations, such deliveries would only equate to 38% of capacity. To the extent other wells in adjoining lease blocks might be attached, additional quantities from such blocks could postpone, but could not avoid, the 60% rate penalty.

of the financial community to extend needed capital to the pipelines. Such effects will definitely be counterproductive to the nation's efforts to reduce its dependence on foreign sources of energy.

Nor is it any answer that the Commission's policy had been on the books for about ten years before it was challenged in this case. Two important changes in circumstances have occurred since the rule was promulgated in 1968. The growing interstate natural gas shortage in the 1970's has given producers added bargaining leverage to insist on accelerated "take or pay for" provisions in gas purchase contracts to the point that since the early 1970's most offshore Louisiana gas purchase contracts obligate pipelines to "take or pay for" gas based upon the ability of producers to deliver it.[10] And, it was not until 1975 that the Commission announced that it considered the 60% condition to be an ongoing, rather than a one-time test. *See, Trunkline Gas Company,* 54 FPC 1087 (1975), quoted at p. 7, n. 8, *supra.*

The rapid depletion of new offshore fields, coupled with the large investments in offshore facilities, makes the 60% condition, now interpreted as a perpetual requirement, a far more serious threat to pipeline cost recovery than it was when first promulgated as a policy statement in 1968. And, as noted, this financial threat arises at a time when the nation can ill afford the consequences of such impediments to the full development of domestic energy resources. Because of its importance, therefore, the question presented should be resolved by this Court.

[10] The court of appeals stated that "common experience" substantiates Transco's argument that many of the newer offshore fields are being substantially depleted in 5 to 7 years. Appendix A at p. 12a. In the same vein, Transco's certificate application projected that facility utilization would decline to 38% of capacity during the fifth year of operation.

2. The Decision Below Erroneously Approves An Open-Ended Certificate Condition Which Is Inconsistent With The Commission's Certificate Responsibilities

Because of the importance of such matters to the construction and administration of the Natural Gas Act, this Court has on a number of occasions decided questions concerning the Commission's power to condition certificates of public convenience and necessity pursuant to Section 7 of the Natural Gas Act. For example, in *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959) (the *"CATCO"* case), this Court ruled that the Commission had authority under Section 7 to reduce a producer's rate at the time of initial certification of a sale by a natural gas producer. And, in *F.P.C.* v. *Sunray DX Oil Co.,* 391 U.S. 9 (1968), the Court upheld the Commission's authority to require a gas producer to make refunds of those amounts collected under an unconditioned temporary certificate which were later determined to exceed the appropriate initial certification price. While the court below correctly stated the general principle that the Commission's conditioning powers are broad,[11] the result reached by the court of appeals in the instant case extends that principle beyond all reasonable limits.

Once pipeline facilities have been constructed, there is no way to resize them or to change their capacity. Therefore, it is evident why the Commission has the affirmative duty to determine, *prior* to construction,

[11] Appendix A at p. 9a, citing *CATCO, supra.*

whether proposed facilities are properly sized and thus "required by the present or future public convenience and necessity." Having made a positive determination in this case, the Commission cannot in the same breath impose a rate penalty condition which says, in effect, "while we find that you need to build these particular facilities, you won't be allowed to recover the costs thereof once annual throughput drops below 60% of capacity." Clearly, such an equivocation is inconsistent with the determination that *these particular facilities* should be constructed. The Commission, we submit, cannot have it both ways.[12]

In this Court's decisions approving certificate conditions imposed by the Commission pursuant to its Section 7 powers, the conditions were either definitive and self-executing at the time the certificate issued or were based upon the preclusion of revenues in excess of the appropriate initial certification level. Unlike the instant case, no confiscation of property through a *post hoc* limitation on the recovery of prudently incurred costs based upon subsequent events was involved. Accordingly, this case presents an important new question concerning the limits of the Commission's conditioning powers under Section 7. Transco submits that the 60% condition is unreasonable on its face because it does indirectly what the Commission is prohibited from doing directly in a Section 4 or 5 rate proceeding, namely, it denies Transco the opportunity to recover its prudent investment.

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[12] Obviously, the time to resolve any questions about the appropriate size of facilities is at the time of initial certification. See p. 4, n. 2, *supra*.

3. The Decision Below Is In Conflict With A Decision Of The District of Columbia Circuit

The instant case would represent the first case to be decided by this Court on the question of whether the Commission has the authority to defeat Section 4 rights through imposition of Section 7 conditions. And, inasmuch as a conflict between circuits exists on that question, the Court should grant the writ.

A recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Algonquin Gas Transmission Co.* v. *F.P.C.*, 534 F.2d 952 (D.C. Cir. 1976) correctly states the relationship of rate conditions imposed in Section 7 certificates to the paramount "fair return on investment" rights protected by Section 4 of the Act:

> The suspension and refund *provisions of § 4 protect regulated companies against deprivation of the substantial rights of covering the costs of doing business and earning a fair return on investment.* By enacting § 4, Congress recognized those rights as substantial, and sheltered them from dissipation through regulatory lag or indecision. *The Commission should not be able to defeat those rights indefinitely by engrafting permanent rate conditions to a § 7 certificate....*

Id. at 956 (emphasis added). The result reached by the Fifth Circuit in the instant case allows the Commission to defeat Transco's right to recover the costs of its investment. Therefore, the decision below is in direct conflict with the District of Columbia Circuit's decision in *Algonquin*. This Court, therefore, should grant the writ to resolve such conflict between the circuits.

4. The Decision Below Violates The Prudent Investment Test For Rate Recovery

Interstate gas pipelines are regulated under the Natural Gas Act on an individual company cost of service basis. This means that pipelines are viewed in the traditional public utility sense whereby they are allowed the opportunity to recover their costs of doing business, including a reasonable return on their prudent investments. Under this individual company cost of service type of regulation, profits or return are determined on the basis of a company's investment, *not* on the size of the gas fields attached to the system or the volume of sales made as a result of purchases from those fields. A reading of the decision below, however, makes clear that the court of appeals failed to properly appreciate the cost of service basis of pipeline rate regulation.[13]

Under the Constitution and the Natural Gas Act, a pipeline may not be denied the opportunity to recover the costs associated with prudent investments which are necessary to render service to its customers. *See, F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U.S. 63 (1935); and *Bluefield Co.* v. *Public Service Commission*, 262 U.S. 679 (1923). Mr. Justice Brandeis set forth the measure of prudent investment and its consequences in this fashion:

> The thing devoted by the investor to the public use is not specific property, . . . but capital embarked in the enterprise. *Upon the capital so invested the federal Constitution guarantees to the utility the opportunity to earn a fair return.*

Missouri ex rel. *Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U.S. 276, 290 (1923) (concurring opinion) (emphasis added).

The 60% load factor condition is inherently unreasonable because it violates this basic principle of utility regulation. At the inevitable time that the facilities are operated at less than 60% of capacity, the pipeline is denied the opportunity to earn a fair return upon the investment in the facilities which the Commission has found to be required by the public convenience and necessity.

[13] For example, the court mistakenly believed that Transco was "risking" a large investment in these facilities for what the court thought were small fields (App. A at p. 8a), and that Transco stood to reap large profits if the fields proved to be large. *Id.* at p. 11a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 19, 1979

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 78-1426

Feb. 6, 1979.

TRANSCONTINENTAL GAS PIPE LINE CORP., *Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSSION, *Respondent.*

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Robert R. Nordhaus, Gen. Counsel, FERC, Howard E. Shapiro, Sol., Barbara J. Weller, McNeill Watkins, Washington, D.C., for respondent.

Petition for Review of an Order of the Federal Energy Regulatory Commission.

Before BROWN, Chief Judge, COLEMAN and TJOFLAT, Circuit Judges.

COLEMAN, Circuit Judge.

In this case Transcontinental Gas Pipe Line Corporation (Transco) petitions for review of a Federal Energy Regulatory Commission (the Commission)[1] order granting

[1] Pursuant to the provisions of the Department of Energy Organization Act, Pub.L.No. 95-91, 91 Stat. 567 (1977) (to be codified in 42 U.S.C. § 7101 et seq.), and Exec. Order No. 12,009, 42 Fed.Reg. 46,267 (1977), the Federal Power Commission ceased to exist on September 30, 1977, and most of its functions and regulatory responsibilities were transferred to the Federal Energy

Transco a certificate of public convenience and necessity to construct and operate a major extension of its natural gas transmission network off the coast of Louisiana in the Gulf of Mexico. The certificate was subject to the condition that Transco comply with § 2.65(b) of the Commission's General Policy and Interpretations, 15 C.F.R. § 2.65(b), which attempts to insure pipeline utilization of at least 60% of capacity by denying the company recovery of pipeline costs if the 60% load factor required by that regulation is not achieved. The legality of the 60% condition is the major issue presented in this petition, but the Commission also argues that review is premature at this time because Transco has not been "aggrieved" within the meaning of the statute which governs judicial review, 15 U.S.C. § 717r (b).

The Facts

On June 21, 1977, Transco applied for authorization to construct and operate a major extension of one of its natural gas pipelines in the Gulf of Mexico off the Louisiana coast. The estimated cost of the extension was $52,000,000, and the estimated maximum daily capacity of the extension was 240,475 million cubic feet of natural gas. Transco estimated that the load factor utilization for the second year of operation would be 65.45% of maximum capacity; for the 1978-79 winter season, 80.26%; and for

Regulatory Commission, which, as an independent administrative agency within the Department of Energy, was activated on October 1, 1977. Section 705(e) of the Organization Act, to be codified as 42 U.S.C. § 7295(e), provides for the substitution of the new Commission as a party in cases such as this. For the purposes of this opinion, the word "Commission", when used in the context of an action taken or statement made prior to October 1, 1977, refers to the Federal Power Commission; when used otherwise, the reference is to the Federal Energy Regulatory Commission.

the fifth year of operation, 38%.[2] Since there was no opposition to Transco's application, the Commission held an abbreviated hearing, as it was permitted to do in such cases, and issued the certificate that same day. The authorization, however, was "subject to compliance with . . . [15 C.F.R. § 2.65(b)]", which provides:

> It is the intention of the Commission to enforce the [60%] requirement [of § 2.65(a)(4)] by permitting offshore pipeline facilities, certificated after the date of this order, to be included in Applicant's cost-of-service in future rate proceedings at an average unit cost predicated upon load factors of not less than 60 percent of the annual capacity available.

Both parties agree that the import of this condition in the certificate is a requirement that Transco operate the pipeline at 60% capacity or be unable to recover part of its costs.[3] Section 2.65(a)(4) of the Commission's General Policy and Interpretations requires an applicant to demonstrate

> that its proposed facilities will be utilized, either by it individually or jointly with other pipeline companies, at a minimum annual load factor of 60 percent of the annual capacity available by the end of a 12-month period following the installation thereof, unless a waiver is issued.

[2] Although there was some confusion at oral argument as to whether the estimate on the fifth year load factor was a part of the record, it appears that the estimate was included on an attachment to Transco's application. Therefore, we believe that this estimate is properly before us.

[3] Read literally, § 2.65(b) does not require the applicant to do anything, and it might be argued that this "condition" is not really a condition at all. Neither party has adopted such an argument, however, and we decline to do so sua sponte.

Literally, this section allows a one-year start-up period and then seems to require 60% utilization in the next year only. Neither party has adopted such an interpretation of the regulation, however, and Transco concedes that the Commission has consistently interpreted the regulation to require 60% utilization in succeeding years. Although the Commission might well clarify the wording of this regulation, deference is due an administrative agency's interpretation of its own regulations, *see, e. g., Pillsbury Co. v. FTC*, 5 Cir. 1966, 354 F.2d 952, 963; and this reading of the regulation is not unreasonable.

The only other fact of apparent importance to the resolution of this case is the depreciation rate. Transco asserts in its brief, at 22, that its latest approved composite depreciation rate is 4.5%, a rate which would mean that, if straight-line depreciation were employed, the pipeline must remain in the rate base for 22 years for the company to recover its investment. The Commission responds that Transco used a depreciation rate of 10% in its application. Brief for Respondent at 38. In its reply brief, at 16-17, Transco asserts that

> The 10 percent rate, however, was used to develop a price for transporting gas for others through the new pipeline. Such rate is not used as a basis for recovering the investment in the authorized facilities, since the revenues generated from the transportation services for others are credited to Transco's overall cost-of-service in its rate proceedings.

A 10% depreciation rate implies full recovery, under straight-line depreciation, in 10 years. Because Transco asserts that utilization will drop below 10% by the fifth year of operation, any injury that it may suffer will not depend upon a depreciation rate of 4.5% or 10%.

Reviewability

Analysis of the reviewability issue must begin with the language of the statute. 15 U.S.C. § 717r(b) provides that "[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals . . . ." Transco is clearly a party to the proceeding, and it is not necessary under the statute that the order be "final". In our view, the reviewability question boils down to whether or not Transco has sustained an "injury in fact".

The Commission's position is that Transco has not been injured by the inclusion of this condition in the certificate and that it will not be injured, if at all, until the issuance of an order which sets just and reasonable rates. It notes that waivers are available, but there is no indication of the criteria used to evaluate waiver requests nor of the frequency with which they are granted.[4] Furthermore, if the condition has not been included in the certificate, the Commission would still be free to apply the policy at the § 4 or § 5 rate proceeding.

Transco's argument that it has been "aggrieved" proceeds along these lines: (1) its data predict a utilization of less than 60% within five years, (2) if the Commission accepts that data (and there is no indication to the contrary), then its refusal to issue a certificate without the 60% condition must mean that it does not intend to waive the condition later, (3) although there is always the possi-

[4] There was also some confusion at oral argument as to when an applicant must apply for a waiver. Counsel for the Commission seemed to take the position that the waiver application must be submitted at the same time as the basic application if the applicant has reason to believe that the pipeline utilization would fall below 60% in the near future. That position seems quite strained and unreasonable, and we do not think that the regulation means that the Commission will not entertain waiver requests after the pipeline has been built.

bility of a change in attitude or personnel at the Commission, this chance is somewhat remote and Transco must assume that it will not be granted a waiver, and (4) the increased risk of non-recovery of part of Transco's $52,000,000 investment because of the uncertainty in administrative action in the future is substantial and generates an immediate injury.

The case law does not provide an easy solution to this question of reviewability. The Commission quotes language from *Rochester Telephone Corp. v. United States,* 307 U.S. 125, 130, 59 S.Ct. 754, 757, 83 L.Ed. 1147 (1939), where Mr. Justice Frankfurter, in summarizing the "negative order" cases, stated that resort to the courts is premature where "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action." *See also FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 619, 64 S.Ct. 281, 88 L.Ed. 333 (1944); *Columbia Broadcasting System v. United States,* 316 U.S. 407, 425, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942).

In this Circuit, the two leading cases on reviewability are *Magnolia Petroleum Co. v. FPC,* 5 Cir. 1956, 236 F.2d 785, 791, *cert. denied,* 352 U.S. 968, 77 S.Ct. 356, 1 L.Ed.2d 322 (1957) (denying reviewability); and *Atlanta Gas Light Co. v. FPC,* 5 Cir. 1973, 476 F.2d 142, 147 (finding reviewability). As stated in the latter case,

> In general, the courts have declined to review nonfinal orders that are not "definitive" in their impact upon the rights of the parties and do not threaten the petitioner with "irreparable harm".
>
> The requirement that the reviewable order be "definitive" in its impact upon the rights of the parties is something more than a requirement that the order be unambiguous in legal effect. It is a requirement that the order have some substantial effect on the parties

> which cannot be altered by subsequent administrative action.

476 F.2d at 147 (citations omitted). This test has since been followed in *Shell Oil Co. v. FPC,* 5 Cir. 1976, 531 F.2d 1324, 1326-27.

In response, Transco cites two cases to support its contention that the order is reviewable. In *Texaco, Inc. v. FPC,* 5 Cir. 1961, 290 F.2d 149, some gas producers had accepted temporary certificates with a vague refund condition and did not appeal until they received permanent certificates with the same condition attached. This Court held that they should have appealed the grant of the temporary certificate, saying

> Clearly, the order granting the temporary certificates, when it embodied the conditions now complained of was an order which then aggrieved the petitioners. . . . This is not such a case as affected only eventualities that would affect petitioners' rights adversely on the contingency of future administrative action. Their right to a certificate without a condition in the terms proposed was then at issue and was then decided. The refusal of the Commission to grant the temporary certificate without the condition was an appealable order.

290 F.2d at 157. The force of this holding is greatly undercut by a case which Transco did not cite, *FPC v. Sunray DX Oil Co.,* 391 U.S. 9, 88 S.Ct. 1526, 20 L.Ed.2d 388 (1968), where the Court held that "parties, at least other than the producer itself, may challenge a temporary certificate at the time a permanent certificate is applied for." 391 U.S. at 44, 88 S.Ct. at 1544. In a footnote the Court cited the Fifth Circuit *Texaco* case and stated that it had no occasion to pass on the correctness of that decision. *Id.* at n. 32. These cases are distinguishable since they involved the temporary certificates issued without notice or hearing

under 15 U.S.C. § 717f(c). The instant case involves a permanent certificate issued after notice and opportunity for comment.

The second case cited by Transco is *Texaco, Inc. v. FPC*, 3 Cir. 1969, 412 F.2d 740. This case involved a challenge to a general rule promulgated by the Commission in violation of the notice-and-comment requirements of the Administrative Procedure Act. In rejecting the argument that Texaco would not be harmed until a later proceeding, the Court stated,

> We believe that Texaco is harmed by being faced with such a general rule which it must overcome in any ad hoc waiver proceeding . . . . In filing a waiver application, an operator is entitled to be confronted only with rules adopted in the procedural manner prescribed by Congress.

412 F.2d at 746. This case is also distinguishable, but it does give some support to the proposition that an order is not unreviewable merely on the possibility of a waiver at some future administrative proceeding.

In the final analysis, arguments can be marshalled both for and against reviewability. Transco appears to be risking large sums of money on a relatively small field of gas, and the inability to recover its costs because of the condition in the certificate has an important bearing on that investment. The order is one which fixes the legal rights of Transco, and the order itself has injected an additional element of uncertainty into the calculus. The record seems fully developed, the issues are concrete, and we think that Transco is entitled to know whether the 60% condition is valid.[5]

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[5] In addition to the effect of the 60% condition on this pipeline extension, the Commission's regulation may be applied to other pipeline extensions proposed by Transco, or by other companies, in the future.

The 60% Condition

Although § 2.65(b) has been a part of the Commission's General Policy and Interpretations since 1968, it seems that the Commission has not always included it as a condition in the certificates of public convenience and necessity as a matter of course. Transco asserts in its brief, at 20, that since 1968 it has been granted approximately 20 offshore construction certificates and that it was not until 1977 that such a condition was imposed in a certificate. This seems understandable, since the policy requires an applicant to demonstrate that the 60% capacity figure will be met, and it states that the Commission intends to enforce it by denying recovery of costs if the 60% figure is not met. Thus, there seems to be no particular reason to require language in the certificate which merely duplicates the policy statement.

15 U.S.C. § 717f(e) provides that "the Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." The issue in this case is not whether § 2.65(b) should have been promulgated as a regulation pursuant to the APA requirements, but whether this condition attached to this certificate is "reasonable" and required by the "public convenience and necessity". Any attack on a condition in a certificate issued by the Commission must confront the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity. *See Atlantic Refining Co. (CATCO) v. Public Service Commission of New York*, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959).

Transco mounts a three-pronged attack on the condition, arguing that it is (1) inconsistent with a determination that the public convenience and necessity require the con-

struction of this pipeline, (2) inherently unreasonable, and (3) unsupported by reasoning or evidence.

Transco's first argument seems to reduce to the proposition that the Commission has an affirmative obligation to evaluate the geological data, determine the recoverable reserves, and pick the appropriate pipeline size at the outset before it issues the certificate. Transco asserts that the Commission is attempting to reserve the right to determine later that Transco should have constructed smaller sized facilities. Of course, the public also has an interest in promoting the optimal use of facilities which have been constructed at the most efficient scale. The public interest would be ill-served by the proliferation of offshore pipelines not built to the most efficient scale or by the use of either inadequate or oversized pipelines. It is part of the Commission's responsibility to consider such factors, and it is not inconsistent to require that a pipeline be utilized at 60% of its capacity and to determine that the pipeline is required by the public convenience and necessity.

Transco's "inherently unreasonable" argument repeats much of its "second-guess" argument, adding that the 60% requirement is unduly onerous and punitive. This conclusion is based upon the fact that gas supplies are not known; they can only be estimated. This much is certainly true, but all business decisions are based upon estimates of the future. If Transco's best estimates indicate a small field, then it certainly could have declined the certificate and applied for a pipeline with a lower capacity. Indeed, it argues that the 60% condition actually works to force companies to hedge their bets by underestimating the supply of natural gas and undersizing the proposed facilities in order to recover their investments. It appears to us that the practical effect of the regulation is to place a little more pressure on companies to refine their estimates so that they will construct facilities of an optimal size. Certainly, no prudent investor would deliberately undersize his

pipeline if his best information indicated a substantial possibility of a large field with the attendant profits.

Transco finally argues that the Commission must adduce some "evidence and reasoning" to support its general policy statement. To whatever degree Transco's argument may be correct, we believe that the Commission has more than discharged any obligation to supply some "evidence and reasoning". In the order denying rehearing, the Commission stated:

> The 60 percent load factor was an exercise of Commission judgment based upon the normal pipeline design capacity required to permit the maximum take provisions permissible under most Southern Louisiana gas purchase contracts. Under these contracts a pipeline is authorized to take up to 125 percent of the daily contract quantity obligation (DCQ). If a field were depleted at a rate necessary to meet the DCQ obligation, the pipeline facilities would have a load factor of 80 percent (i. e. 100 ÷ 125 = 80%). However, to allow for flexibility in the design of facilities, this optimum level of operation was discounted to a 60% level which, it should be noted, is the annual load factor attained if the pipeline buyer takes gas at a rate equal to only 75% of the DCQ (i. e., 75% ÷ 125% = 60%).

This condition is clearly not arbitrary or capricious, and the Commission has articulated a principled rationale for choosing the figure of 60%.[6]

Finally, Transco argues that many of the newer Louisiana fields are being substantially depleted in 5 to 7 years and that few firms which try to recover such gas will be able to recover their investments if the 60% rule is upheld

[6] It is of some significance that neither party has cited any case dealing with this regulation and that a computer search failed to uncover any such cases. Somehow the industry has been able to live with this regulation for the last ten years.

and applied. We could not discover any support for this statement in the record, but common experience suggests that it may be substantially accurate. The country has experienced unprecedented shortages of natural gas in recent winters, and those shortages may have been at least partly caused by public policies which have kept the price of natural gas at a low level and discouraged exploration and drilling for marginal or doubtful fields. Congress has clearly been advised of the arguments and evidence, pro and con, and our system of government entrusts such matters in the first instance to that body. Congress has in turn, placed substantial responsibilities in the hands of the Commission, and presumably that body is also aware of any declining production in the Louisiana fields. It is not totally irrational, arbitrary, or capricious for the Commission to attempt to deal with these important, complex issues in the manner which it has employed in this case. We may not substitute our judgment for that of the Commission. *Cf. Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1426

TRANSCONTINENTAL GAS PIPE LINE CORP., *Petitioner*,

versus

FEDERAL ENERGY REGULATORY COMM., *Respondent*.

Petition for Review on an Order of the Federal Energy Regulatory Commission

ON PETITION FOR REHEARING

(September 20, 1979)

Before BROWN, Chief Judge, COLEMAN, and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for clarification and rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J. P. COLEMAN
United States Circuit Judge
September 14, 1979

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CP77-453

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

CERTIFICATE

(Construction and Operation)

Before Commissioners:

Charles B. Curtis, Chairman;
Don S. Smith, and Georgiana Sheldon

Findings and Order After Statutory Hearing Issuing Certificate of Public Convenience and Necessity

(Issued September 28, 1977)

On June 21, 1977, Transcontinental Gas Pipe Line Corporation (Transco), filed in Docket No. CP77-453 an application requesting authorization to extend its Southeast Louisiana Gathering System from Block 66, South Marsh Island Area (SMI) Offshore Louisiana into SMI Blocks 106, 130 and 132 and Block 331, Vermillion Area, Offshore Louisiana. The proposed facilities will cost an estimated $52,000,000. Transco, also requests authorization to transport gas located proximate to the proposed line for Columbia Gulf Transmission Company, (Columbia Gulf), Consolidated Gas Supply Corporation (Consolidated) and Texas Eastern Transmission Corporation (Texas Eastern) which have signed precedent letter agreements with Transco for transportation service.

All the production from SMI 106, 130 and 132 and 25 percent of the production from Vermilion 331 is committed to Transco under advance payment agreements. Texas Eastern also has a 25 percent commitment in Vermilion 331 with the remaining interest being uncommitted at this time. All the gas to be produced from Vermilion 313 which is proximate to Transco's proposed line is committed to Columbia Gas Transmission Company (Columbia Gas) an affiliate of Columbia Gulf and Consolidated.

With the exception of Columbia Gas Development Company and CNG Producing Company which have filed certificate applications to sell their share of Vermilion 313 gas to Columbia Gas and Consolidated, respectively, none of the producer-suppliers has filed related certificate applications covering their sales to the respective pipeline purchasers.

Transco's request for authorization to transport gas for Columbia Gulf, Texas Eastern and Consolidated is dismissed as premature without prejudice to the resubmittal of an application requesting such authority at such time as Transco and the parties execute definitive agreements covering such service.

Transco proposes to construct 17.96 miles of 24-inch diameter pipeline extending from SMI 66 to a pipeline manifold to be located in SMI 106. From the Block 106 platform the proposed line will divide into two legs. The East Leg will consist of 8.62 miles of 16-inch diameter pipe extending from the Block 106 platform to Shell Oil Company's (Shell) SMI 130 "C" production platform. Shell has two other producing platforms in Block 130, therefore 0.84 miles of 12-inch diameter pipe and 0.83 miles of 8-inch diameter pipe are proposed to be constructed to connect Shell's "A" and "B" platforms to the east leg. Shell also intends to construct a production platform in SMI 132, therefore Transco proposes to construct 5.28 miles of 12-inch diameter pipeline extending from Shell's "A"

platform in SMI 130 to the proposed Shell platform in SMI 132.

The West Leg will consist of 16.11 miles of 20-inch diameter pipeline extending from the SMI 106 manifold through Block 313, Vermilion Area to Marathon Oil Company's (Marathon) producing platform in adjacent Vermilion Area Block 331. Transco will also construct 0.04 miles of 10-inch diameter pipeline in SMI 106 to connect Shell's production platform to Transco's manifold platform in that block.

In addition, Transco will construct five meter and regulator stations in SMI 106, 130 and 132 and in Vermilion 331.

Construction of all the facilities, with the exception those to SMI 132, will commence this year and completion is expected within three months. Construction of the SMI 132 facilities will commence in May 1978 and completion is expected within three months.

Transco states that the facilities will be constructed in accordance with the Department of Transportation's pipeline safety standards.

Approval of this proposed project would not constitute a major Federal action significantly affecting the quality of human environment.

After due notice by publication in the Federal Register, petitions to intervene were filed. On August 4, 1977, Consolidated Edison Company of New York, Inc., filed a petition to intervene. On August 10, 1977, Columbia Gas Transmission Corporation filed a petition to intervene. On August 15, 1977, Consolidated Gas Supply Corporation and United Gas Pipe Line Company filed petitions to intervene. None of the petitions was in opposition to the application.

At a hearing held on September 28, 1977, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application and exhibits thereto, submitted in support of the authorizations sought herein, and upon consideration of the record.

The Commission finds:

(1) Applicant, Transcontinental Gas Pipe Line Corporation is a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The transportation of natural gas hereinbefore described as more fully described in the application in this proceeding, is made in interstate commerce, subject to the jurisdiction of the Commission, and is subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Transcontinental Gas Pipe Line Corporation in Docket No. CP77-453 to permit the construction and operation of the facilities proposed subject to compliance with Section 157.20(a), (c)(3), (c)(4), (e) and (g) of the Regulation and 2.65(b) of the Rules of Practice and Procedure. The facilities authorized are to be placed into service within one year from the date of the order.

(B) Applicant is advised that the certificate issued in Ordering Paragraph (A) includes a requirement that absent the filing of related producer certificate applications, letters of commitment for the sale of gas to Transco must be submitted by the related producers. Appendix A details the specific conditions to be included in the letter of commitment.

(C) Transco's request to transport gas is dismissed without prejudice to the resubmittal of an application requesting such authority at such time as the parties execute definitive agreements.

(D) The certificate granted in Ordering Paragraph (A) above is not transferable and shall be effective only so long as Transco continues the acts of operations hereby authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations and order of the Commission.

(E) Consolidated Gas Supply Corporation, Consolidated Edison Company of New York, Inc., Columbia Gas Transmission Corporation and United Gas Pipe Line Company are permitted to intervene in Docket No. CP77-453 subject to the rules and regulations of the Commission; *Provided, however,* that participation by such intervenor shall be limited to matters affecing asserted rights and interests as specifically set forth in the petitions to intervene; and *Provided, further,* that the admission of such intervenor shall not be construed as recognition by the Commission that it might be aggrieved because of any order of the Commission entered in these proceedings.

By the Commission.

(SEAL)

Kenneth F. Plumb
Secretary

Appendix A

(1) The filing of related producer certificate applications or written commitments to sell the gas covered by such application to the Applicant is required, unless the producer is a small producer as defined in Section 157.40 and elects to sell the gas pursuant to a small producer certificate. These commitments shall be verified under oath by a responsible official of the company and shall be filed in the pipeline docket. The commitment shall contain the producer's agreement to:

(a) Accept a certificate at the applicable just and reasonable rate as determined by the Commission or the contract rate whichever is lower.

(b) File a waiver of refund credit and contingent escalations as required by Section 2.56(i), if it elects to collect the rate prescribed in either Opinion No. 699-H or Opinion No. 770 and a statement demonstrating the applicability of the national rate.

(c) Accept a certificate conditioned in accordance with Section 157.41, without prejudice to its right to seek rehearing and court review as to the Section 157.41 condition.

(d) File a rate schedule that complies with all the applicable rules and regulations including Sections 154.93 and 154.103.

(e) Waive its right to file under Section 2.70(b)(3) for a limited term certificate.

(f) Commence deliveries within 30 days of the issuance of a certificate or within 30 days of the completion of the Applicant's facilities, whichever comes later.

(g) The written commitment provided for herein, to be provided by the producer-seller, shall identify the acreage or blocks and depths from which the gas

is to be produced and delivered, the present estimate of recoverable reserves and deliverability from the acreage, and the sworn statement of an authorized official of the producer that it assumes a binding obligation to deliver the gas produced from the acreage to the subject pipeline company within a reasonable time of the completion of the pipeline's facilities constructed to receive and transport such gas.

If the producer contemplates filing under the optional procedure, the commitment shall contain the producer's agreement:

(a) That the gas covered by the related contract will be sold to the Applicant and no other purchaser.

(b) Deliveries will commence within a reasonable time of completion of the Applicant's facilities.

(c) To continue the sale of natural gas to Applicant pursuant to the related contract and any amendment and supplement thereto agreed to by the parties or any successor agreement.

(d) In the event a certificate is not issued or accepted, or in the event that future Commission action or non-action is otherwise not effective to authorize the sale of gas, to have on file an application pursuant to the applicable Rules and Regulations of the Commission and such other lawful orders of the Commission as may be issued in the future.

(2) The filing by the Applicant of contracts for the sale of gas to it by small producers or written commitments by the small producers to sell the gas covered by such contracts to the Applicant. These commitments shall be verified under oath by a responsible official of the company and shall contain the small producer's agreement to commence deliveries within a reasonable time of the completion of the Applicant's facilities.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP77-453

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

ERRATA NOTICE

(December 7, 1977)

Findings and Order After Statutory Hearing Issuing Certificate of Public Convenience and Necessity

(Issued September 28, 1977)

Page 1, Second paragraph, line 3, Docket No. CP77-453

Transcontinental Gas Pipe Line Corporation
is amended to read:

"to Transco under certain advance payment or precedent agreements."

Kenneth F. Plumb,
Secretary

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP77-453

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

CERTIFICATE

Before Commissioners:

Charles B. Curtis, Chairman;
Don S. Smith, Georgiana Sheldon,
Matthew Holden, Jr., and George R. Hall.

Order Denying Application for Rehearing

(Issued December 30, 1977)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated

thereunder. The functions which are the subject of these proceedings were specifically transferred to the FERC by Section 402(a)(1) of the DOE Act.

The joint regulation adopted on October 1, 1977, by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR ——, provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above-mentioned authorities.

On June 21, 1977, Transcontinental Gas Pipe Line Corporation (Transco), filed in Docket No. CP77-453 an application requesting authorization to extend its Southeast Louisiana Gathering System from Block 66, South Marsh Island Area (SMI) Offshore Louisiana into SMI Blocks 106, 130, and 132 and Vermillion Area, Offshore Louisiana Block 331. Transco also requested authorization to transport gas located proximate to the proposed line for Columbia Gulf Transmission Company, Consolidated Gas Supply Corporation, and Texas Eastern Transmission Corporation.

By order issued September 28, 1977, we issued Transco a certificate authorizing the construction and operation of the proposed facilities "subject to compliance with Section . . . 2.65(b) of the Rules of Practice and Procedure." On October 28, 1977, Transco filed an application for rehearing of this order requesting that we delete the Section 2.65(b) condition or, alternatively, set the matter of the propriety of attaching this condition to Transco's certificate for a formal hearing.

Section 2.65 was promulgated June 12, 1968, as a policy statement by Commission Order No. 363. It states:

> (a) . . . We direct our staff to review . . . [offshore] applications on both a joint and individual company basis with a view toward the development of pipeline company gas exchange procedures that will minimize cross-hauls and toward the promotion of joint use arrangements that will assure the early full utilization of large capacity in the Outer-Continental Shelf area. . . .

In this connection, Section 2.65 requires additional information in the application exhibits which would:

> (1) Detail . . . the efforts . . . [applicant] has made to utilize the existing and proposed offshore facilities owned by other jurisdictional companies to transport applicant's gas;
>
> (2) Demonstrate that it has consulted with other jurisdictional entities with respect to the possibility of utilizing the proposed facilities to transport gas to onshore installations for such entities;
>
> (3) Utilize 30-inch (or larger if technologically possible) pipe for its offshore main line facilities although upon good cause shown Applicant may demonstrate in the alternative, the feasibility of a smaller proposed line;
>
> (4) Demonstrate that its proposed facilities will be utilized, either by it individually or jointly with other pipeline companies, at a minimum annual load factor of 60 percent of the annual capacity available by the end of a 12-month period following the installation thereof, unless a waiver is issued.

Paragraph (b) of Section 2.65 provides:

> It is the intention of the Commission to enforce the fourth requirement by permitting offshore pipeline facilities, certificated after the date of this order, to be included in Applicant's cost-of-service in future rate proceedings at an average unit cost predicated upon load factors of not less than 60 percent of the annual capacity available.

Two considerations are involved in Transco's request: (1) whether the 60 percent rule was properly applied in this case and (2) the propriety of the rule itself.

We believe the rule was properly applied. Transco was well aware of the rule and knew it would be applied to its certificate; so, it is reasonable to assume that if facts existed which would have called for some amelioration of the rule in this proceeding Transco would have presented them in its original application. Yet it did not. It stated (certificate application, p. 5) that its proposed system had a maximum capacity of 240,475 Mcf per day and that (*id.*, p. 3) its projected daily purchase and transportation volumes in the second year of operation were 157,400 Mcf/D, or 65.5 percent of maximum capacity. In its Exhibit G, page 2, it showed projected daily purchase and transportation volumes of 193,000 Mcf/D, or 80.25 percent of maximum capacity for the 1978-79 winter. Transco also states (*id.*, p. 5) that it expects to receive 91.66 percent of the gas from an estimated 100,000 Mcf per day development project in Vermilion Block 310 which it would transport through the facilities certificated in the instant docket. In its application for rehearing, Transco presented no facts to support its request for amelioration of the 60 percent rule in this case, and has substituted therefor speculation about a possible future hardship.

Since Transco has raised no factual matters herein for disposition, the Commission is not required to set this matter for hearing. *Sun Oil Company* v. *FPC*, 256 F.2d 233 (CA-5, 1958); *Hunt Oil Company, et al.* v. *FPC*, 424 FPC 982 (CA-5, 1970); *McCulloch Interstate Gas Corp.* v. *FPC*, 536 F.2d 910 (CA-10, 1976). And we decline to do so.

As previously noted, this rule was promulgated in 1968 as a policy statement. Transco sought clarification and modification of it at that time by way of a petition for clarification of an Order issued May 3, 1968, in Docket No.

CP68-177 issuing Transco a certificate of public convenience and necessity wherein the rule was applied. The petition was responded to by the Commission on July 25, 1968 ("Order on Petition for Clarification Of Order Issuing Conditional Certificate Of Public Convenience And Necessity And Of Statement Of Policy, Order No. 363," Docket Nos. CP68-177 and R-341). We believe that the pertinent parts of this response, though voluminous, should be quoted herein in full. They are as follows:

> Transco seeks clarification of . . . questions: . . . What is the basis for the imposition of a 12 month/60 percent minimum annual load factor standard for offshore facilities? (Petition, p. 4). Transco requests, in light of the fact that production build-up may take several years after a new supply of natural gas is attached, that the 60 percent load factor requirement be imposed after a 3-year, rather than a 1-year build-up; or alternatively, that the imposition of any load factor requirement await the 'determinations' emanating from the Commission's Technical Advisory Committee on offshore natural gas, established by Commission order, issued June 19, 1968, 39 FPC ——. And, further, Transco urges that the provision for enforcement of the 60 percent requirement in any subsequent rate case be deleted from our orders.
>
> We believe that the policy objectives and the related certificate filing requirements, as set out in our May 3 and June 4, 1968, orders, are sound and should not be modified at least until such time as the Commission and the industry gain additional experience in searching out all possible means of decreasing unit transmission costs for offshore natural gas.
>
> The 60 percent load factor was an exercise of Commission judgment based upon the normal pipeline design capacity required to permit the maximum take provisions permissible under most Southern Louisi-

ana gas purchase contracts. Under these contracts a pipeline is authorized to take up to 125 percent of the daily contract quantity obligation (DCQ). If a field were depleted at a rate necessary to meet the DCQ obligation, the pipeline facilities would have a load factor of 80 percent (i.e. 100 ÷ 125 = 80%). However, to allow for flexibility in the design of facilities, this optimum level of operation was discounted to a 60% level which, it should be noted, is the annual load factor attained if the pipeline buyer takes gas at a rate equal to only 75% of the DCQ, (i.e., 75%÷125%= 60%).

Concerning the propriety of the requirement that pipelines shall demonstrate that proposed mainline offshore facilities will have a minimum load factor of 60 percent within 12 months after installation, Transco correctly points out that some fields will have projected production build-up periods which may make the imposition of these criteria inappropriate. If so, it was for this reason that we expressly provided that upon an appropriate showing in the application (e.g., a schedule of estimated daily gas and liquids production, by years) we were prepared to waive the 12 months period and prescribe a longer period within which the 60% minimum load factor could be met. In seeking such extensions because of the build-up period, we will also expect the pipeline buyer and the producer sellers to advise us, of the estimated proven and probable reserves, and why a more rapid developmental program cannot be undertaken. If accumulated experience later demonstrates that this requirement should be adjusted in some manner we will of course entertain a further request to do so.

We also see no reason for deleting the paragraph from our orders, which apprises pipeline certificate applicants of our intended cost-of-service treatment where offshore facilities fail to achieve a 60 percent

load factor within the time period prescribed. It should be obvious, however, that we do not intend to apply the policy inflexibly to cases where lower utilization of installed offshore pipeline capacity than had been contemplated at the time of certification is demonstrably due to unavoidable situations beyond the control of the pipeline.

For these reasons we think that the Commission's offshore pipeline policy is a workable one and should serve as a guide in future gas certificate and rate proceedings before the Commission without any modifications at this time.

More recently Transco questioned the 60 percent rule in connection with a certificate of public convenience and necessity granted it for construction and operation of transmission facilities, including offshore Louisiana transmission facilities, in Docket No. CP76-304 by order issued April 12, 1977. There Transco took exception to application of the rule to it in a temporary certificate (in the same docket) and requested an evidentiary hearing thereon. In our above-mentioned order of April 12 we denied Transco's request for hearing and said:

> The policy of Section 2.65 is to assure that the pipeline will use every effort to utilize a new facility to the maximum extent possible as soon as possible. Transco's actual operating conditions will not be known for several months. Therefore, without actual operating conditions, an evidentiary hearing is premature and denial without prejudice is proper. In denial without prejudice is proper. In the event Transco's system is not operating at 60-percent of capacity at the end of a 12-month period, Transco may seek an evidentiary hearing or may, pursuant to Section 2.65 (a)(4), seek waiver of the 60 percent condition.

What we have said in our prior orders on this subject is equally applicable here. Transco seeks elimination of the

60 percent rule, as least in this case, because of its view that such a condition places an unreasonable burden on it (*i.e.*, the risk that it will be unable to justify at a later date the granting of a waiver of the 60 percent rule in the event it fails to comply with such rule). But the burden is not an unreasonable one for, as previously explained, there is sound justification for such rule. And, if Transco cannot adequately justify a waiver of the 60 percent rule, then it should be required in a rate case to compute its load factor at 60 percent for these facilities even though such facilities were utilized at a lesser load factor. While Transco and its stockholders admittedly are taking a risk, it is one that they, not Transco's customers, properly should bear. Certainly it seems clear that the customers should not bear the loss if Transco cannot comply with the 60 percent rule and cannot justify its failure to do so. We shall therefore deny Transco's application for rehearing.

The Commission finds:

Transco's application for rehearing presents no new facts or principles of law which warrant any modification of our September 28, 1977 order.

The Commission orders:

Transco's application for rehearing, filed October 28, 1977, including its request for deletion of the Section 2.65(b) condition in its certificate and, in the alternative, for hearing thereon, is hereby denied. This is without, prejudice, however, to Transco's requesting waiver of such condition after actual operating conditions are known, if it so desires.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary

APPENDIX F

The Natural Gas Act, 52 Stat. 821-833, As Amended, 15 U.S.C. §§ 717-717W, Provides in Pertinent Part:

Section 7(c)

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particu-

lar customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [15 U.S.C. § 717f(c)]

* * * * * * * * * *

Section 7(e)

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [15 U.S.C. § 717f(e)]

* * * * * * * * * *

APPENDIX G

18 CFR § 2.65 Applications for certificates of public convenience and necessity for gas transmission facilities to be installed in the off-shore southern Louisiana area.

(a) It will be the general policy of the Commission to require that applications for certificates of public convenience and necessity, filed pursuant to section 7(c) of the Natural Gas Act, for the construction and operation of pipeline facilities to be installed in the southern Louisiana offshore area, be filed on or before September 1st of the year immediately preceding the proposed installation. We direct our staff to review these applications on both a joint and individual company basis with a view toward the development of pipeline company gas exchange procedures that will minimize cross-hauls and toward the promotion of joint use arrangements that will assure the early full utilization of large capacity facilities in the Outer-Continental Shelf area. To assist this Commission staff effort, and to aid the Commission's disposition of offshore certificate applications during our formal and statutory hearing procedures, an applicant should include as a part of Exhibit Z to its application, additional information which will:

(1) Detail with appropriate engineering and economic showings the efforts it has made to utilize the existing and proposed offshore facilities owned by other jurisdictional companies to transport Applicant's gas;

(2) Demonstrate that it has consulted with other jurisdictional entities with respect to the possibility of utilizing the proposed facilities to transport gas to onshore installations for such entities;

(3) Utilize 30-inch (or larger if technologically possible) pipe for its offshore main line facilities although upon good cause shown Applicant may demonstrate in the alternative, the feasibility of a smaller proposed line;

(4) Demonstrate that its proposed facilities will be utilized, either by it individually or jointly with other pipeline companies, at a minimum annual load factor of 60 percent of the annual capacity available by the end of a 12-month period following the installation thereof, unless a waiver is issued.

(b) It is the intention of the Commission to enforce the fourth requirement by permitting offshore pipeline facilities, certificated after the date of this order, to be included in Applicant's cost-of-service in future rate proceedings at an average unit cost predicated upon load factors of not less than 60 percent of the annual capacity available.

[Order 363, 33 FR 8593, June 12, 1968]

Supreme Court, U. S.
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No. 79-963

In the Supreme Court of the United States

OCTOBER TERM, 1979

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 589 F. 2d 186. The opinions and orders of the Federal Energy Regulatory Commission (Pet. App. B-E) are not reported.[1]

[1]Under Section 402(a)(1)(C),(D),(E), and (F) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 583, 42 U.S.C. (Supp. I) 7172(a)(1)(C), (D), (E), and (F), this agency has succeeded to the relevant functions and responsibilities of the former Federal Power Commission with respect to the certification and regulation of sales of natural gas in interstate commerce under the Natural Gas Act, 15 U.S.C. 717-717w. The term "Commission" herein refers to the Federal Power Commission or the Federal Energy Regulatory Commission as the context indicates.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1979. A petition for rehearing was denied on September 20, 1979 (Pet. App. B). The petition for a writ of certiorari was filed on December 19, 1979 The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commission, in issuing a certificate of public convenience and necessity authorizing the construction of a natural gas pipeline, may properly condition the certificate so as to permit the recovery of the costs of such construction in future rate proceedings based on the actual use of not less than 60 percent of the pipeline's capacity.

STATUTE AND REGULATION INVOLVED

Section 7(e) of the Natural Gas Act, 15 U.S.C. 717f(e), and 18 C.F.R. 2.65 are reprinted at Pet. App. 34a-36a.

STATEMENT

In 1968, the Commission incorporated in its regulations a general statement of policy concerning applications for certificates of public convenience and necessity for the construction and operation of pipeline transmission facilities in the offshore Southern Louisiana area. These regulations sought to achieve the optimum use of offshore, high cost pipeline facilities and thus to minimize the expense of developing offshore gas reserves, by discouraging the construction of unnecessary, duplicative and over-sized facilities and encouraging the joint utilization of large diameter pipelines in the offshore area. 39 F.P.C. 925 (1968). Thus, 18 C.F.R. 2.65(a)(4) requires that an applicant for a certificate

demonstrate that, by the end of a 12-month period following installation, the proposed facilities will be utilized to a level of at least 60 percent of the "annual capacity available." In turn, 18 C.F.R. 2.65(b) provides that:

> It is the intention of the Commission to enforce the [60%] requirement [of 18 C.F.R. 2.65(a) (4)] by permitting offshore pipeline facilities, certificated after the date of this order, to be included in Applicant's cost-of-service in future rate proceedings at an average unit cost predicated upon load factors of not less than 60 percent of the annual capacity available.

In June 1977, petitioner, Transcontinental Gas Pipe Line Corporation ("Transco") sought authorization to construct a major extension of one of its natural gas pipelines off the Louisiana coast. There being no opposition to the application, the Commission issued the certificate with the 60 percent condition (Pet. App. 18a). The Commission denied Transco's petition for rehearing requesting deletion of the 60 percent condition (Pet. App. 25a-32a). The court of appeals affirmed on the merits (Pet. App. 9a-12a).[2]

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[2]The court rejected the Commission's jurisdictional claim that Transco was not presently "aggrieved" by the Commission's order (Pet. App. 5a-8a). The Commission had argued that the earliest Transco could suffer any aggrievement would be after the conclusion of a rate proceeding under Section 4 or 5 of the Natural Gas Act and the issuance of a Commission order setting just and reasonable rates.

We do not abandon this argument. However, since the court of appeals decided this case on the merits and we support its ruling, we do not press the reviewability issue at this time.

ARGUMENT

In this case, the court of appeals concluded that the 60 percent capacity condition imposed by the Commission in Transco's certificate was "clearly not arbitrary or capricious" but rather rested upon a "principled rationale * * *" (Pet. App. 11a). Accordingly, it upheld the condition under "the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity" (*id.* at 9a). That ruling was proper, and further review by this Court is not warranted.

1. Through the rates it charges for transportation and sales of gas, a regulated pipeline such as Transco recovers the costs of providing that service as well as a return on its investment. Its overall rates are designed to provide sufficient revenues to cover all of its costs, including fixed costs, *i.e.*, costs which do not vary with the volume of gas transported or sold by the pipeline, such as investment in pipeline facilities, depreciation and taxes.

Petitioner argues (Pet. 11-12) that the Commission had the affirmative duty "*prior* to construction" to determine whether the proposed facilities were of the proper size to serve the present or future public interest. Having made the determination that the facility in issue here met those requirements, the Commission, so the argument runs, may not "in the same breath * * * impose a rate penalty condition" once annual output falls below 60 percent of capacity. This argument ignores the Commission's continuing duty to serve the public interest.

As the court of appeals reasoned in rejecting this argument (Pet. App. 10a), "the public also has an interest in promoting the optimal use of facilities which have been constructed at the most efficient scale. The

public interest would be ill-served by the proliferation of offshore pipelines not built to the most efficient scale or by the use of either inadequate or oversized pipelines. It is part of the Commission's responsibility to consider such factors, and it is not inconsistent to require that a pipeline be utilized at 60 percent of its capacity and to determine that the pipeline is required by the public convenience and necessity."

Petitioner argues alternatively (Pet. 7-8, 8-9, 10), however, that the Commission's 60 percent condition is properly viewed as a limited, "one-time test," running for one year only, from the end of the first 12-month period following installation of the proposed facilities. Under this interpretation, petitioner asserts that it has satisfied the 60% condition. This contention is not well founded.

The Commission has consistently interpreted the regulation to require 60 percent utilization in *all* succeeding years (see Pet. App. 4a).[3] In doing so, it has determined that the future public convenience and necessity require that the facilities be utilized at not less than 60 percent of their annual available capacity. Indeed, the fact that the Commission specified "future

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[3]In 1975, two years before the petitioner submitted its application for the instant certificate, the Commission held that the 60 percent requirement had continuing applicability (*Trunkline Gas Co.*, 54 F.P.C. 1087, 1092-1093 (1975)):

> A single resolution of the 60 percent load factor condition is not what is intended by the language of paragraph "A(4)." The policy of Section 2.65 is intended to be one of continuing applicability and paragraph "A(4)" reflects that policy objective. The Commission recognizes that all off-shore facilities may not be connected to unlimited supplies of gas which will enable the facilities to be operated at a 60 percent load factor in perpetuity; however, when the time comes that any particular facility may be limited in the supply of gas available to it, the Commission will consider the merits of modifying the 60 percent requirement.

rate proceedings" in its statement of policy (18 C.F.R. 2.65) indicates that it never intended the 60 percent requirement to be a "one-time test." In the Commission's judgment, the principal purpose of enforcing the 60 percent utilization requirement (by permitting pipeline operators such as Transco to recover costs invested in the facility as though it were utilized at 60 percent capacity) is to protect consumers from paying unnecessary costs associated with over-designed, under-used facilities. See *Acker* v. *United States*, 298 U.S. 426, 430-431 (1936).

Manifestly, this is a proper regulatory aim. The Commission's primary duty under the Natural Gas Act is to protect gas consumers. This is accomplished in part through its broad authority to condition certificates of public convenience and necessity. See *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 391 (1959). Under the Act, the Commission is obliged to determine whether certification is in the "present or *future* public convenience and necessity" 15 U.S.C. 717f(e) (emphasis added). The proper exercise of this power does not mean that before imposing conditions on a certificate the Commission must be able to predict the future based on documentary evidence. "Rather, we think that a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961), citing *Atlantic Refining Co.* v. *Public Service Commission of New York supra*, 360 U.S. at 391.

It is settled that when an agency is charged with the administration of a statute, its interpretation of that statute is entitled to great weight. *Udall* v. *Tallman*, 380

U.S. 1, 16 (1965). It follows that where, as here, "the construction of an administrative regulation * * * is in issue, deference is even more clearly in order." *Ibid.* The Commission's interpretation of its own regulation is reasonable, is consistent with the purposes of the Natural Gas Act, and should be controlling.

2. Petitioner further contends (Pet. 10) that circumstances have changed since 1968, when the Commission issued its statement of policy requiring 60 percent utilization of offshore transmission facilities. It is asserted that these changed circumstances— particularly the rapid depletion of offshore fields—have made it impossible for the company to meet the 60 percent condition.

The court of appeals properly rejected this claim (Pet. App. 11a-12a). While it clearly understood the significance of recent natural gas shortages, it also recognized that, as a reviewing court, its role was a limited one (*id.* at 12a):

> Congress has * * * placed substantial responsibilities in the hands of the Commission, and presumably that body is also aware of any declining production in the Louisiana fields. It is not totally irrational, arbitrary, or capricious for the Commission to attempt to deal with these important, complex issues in the manner which it has employed in this case. We may not substitute our judgment for that of the Commission. *Cf. Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 98 S. Ct. 1197, 55 L.Ed. 2d 460 (1978).

That the Commission is acutely aware of the problem of declining production is made clear by 18 C.F.R. 2.65(a)(4), which specifically provides an opportunity for

waiver of the 60 percent requirement. Moreover, the Commission has made it plain from the policy's inception that it intends to take a flexible approach in enforcing the requirement (see note 3, *supra*).

3. The court of appeals properly rejected petitioner's additional claim—which it repeats here (Pet. 12, 14-15)—that the 60 percent condition is confiscatory and an improper curtailment of the pipeline's right to recover its prudently invested costs. The mere fact that future gas supplies are not known, but can only be estimated, does not bar the Commission from relying on the applicant's estimates and holding the company to recovering its costs on the basis of those estimates for which the pipeline was built. As the court below cogently stated (Pet. App. 10a-11a):

> [B]ut all business decisions are based upon estimates of the future. If Transco's best estimates indicate a small field, then it certainly could have declined the certificate and applied for a pipeline with a lower capacity. Indeed, it argues that the 60% condition actually works to force companies to hedge their bets by underestimating the supply of natural gas and undersizing the proposed facilities in order to recover their investments. It appears to us that the practical effect of the regulation is to place a little more pressure on companies to refine their estimates so that they will construct facilities of an optimal size. Certainly, no prudent investor would deliberately undersize his pipeline if his best information indicated a substantial possibility of a large field with the attendant profits.

Moreover, the Commission has noted that "[t]he fact that a pipeline's source reserves will ultimately deplete is a concern that can be accommodated through proper

depreciation of the facilities." *Trunkline Gas Co.*, 54 F.P.C. 1087, 1092 (1975). Depreciation rates may be set independently for offshore facilities on a field by field basis. In this case, Transco's application requested authorization to construct a large diameter transmission facility designed for joint use with other pipeline companies, as opposed to a lateral, gathering line connected to a particular field. Therefore, Transco is not limited to a single, depleting field for its source of supply; rather, it can take advantage of other areas of undeveloped reserves to ensure at least 60 percent utilization of available capacity.

4. Finally, contrary to petitioner's contention (Pet. 13), the decision below is not in conflict with the District of Columbia Circuit's decision in *Algonquin Gas Transmission Co.* v. *FPC*, 534 F. 2d 952 (D.C. Cir. 1976). In *Algonquin*, the Commission issued temporary certificates to a pipeline company to permit the sale of excess volumes of synthetic natural gas. The Commission applied to the temporary certificates the same rate condition that governed the company's production and sale of synthetic natural gas pursuant to an original certificate. The original certificate condition provided that the company could not, "without prior Commission approval," file a rate schedule under Section 4 of the Act, 15 U.S.C. 717c, that calculated fixed unit costs on the basis of less than full design capacity production.

The court of appeals in *Algonquin* did not find the condition in the original certificate invalid. Rather, it concluded that the Commission could not automatically impose that condition on the temporary certificates without additional consideration. The court noted (534 F. 2d at 956) that the condition in the original certificate "must be read as including the implied condition that

* * * Commission approval must not be unreasonably withheld * * *." The purpose of including the condition in the original certificate was "to protect consumer interests against inflated costs until the Commission has sufficient operating data before it to make a more sophisticated appraisal of the costs and benefits of doing business." *Ibid.* Accordingly, if the Commission concluded on sufficient evidence that it was in the public interest to impose the condition on the company's temporary certificates, "it should provide specific findings supporting that conclusion." *Id.* at 957.

Here, in contrast, the Commission has not limited Transco's opportunity to initiate a Section 4 rate making proceeding seeking recovery of costs invested in the facilities. Nor has the Commission interpreted the 60 percent condition as rigid or arbitrarily binding on Section 4 proceedings. Consistent with the approach suggested in *Algonquin* (534 F. 2d at 957-958), the Commission here carefully weighed the relevant policy and consumer considerations in monitoring the construction of high-cost offshore facilities to assure that they were not oversized.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondent.

BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *AMICUS CURIAE,* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 42 of the Rules of this Court, the Interstate Natural Gas Association of America (INGAA) hereby files its brief, as *Amicus Curiae,* in support of Petitioner Transcontinental Gas Pipe Line Corporation's (Transco) Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *Transcontinental Gas Pipe Line Corporation* v. *F.E.R.C.,* 589 F.2d 186 (5th Cir. 1979).

INGAA has received the parties' consent to file the instant brief and has filed with the Clerk of the Court letters so indicating.

STATEMENT OF INGAA'S INTEREST

INGAA is a nonprofit, national trade association representing virtually all of the major natural gas transmission companies operating in interstate commerce in the United States. Insofar as pertinent hereto, INGAA's member companies, which account for approximately ninety percent of all natural gas transported and sold in interstate commerce, are subject to the jurisdiction of the Federal Energy Regulatory Commission (Commission) under the Natural Gas Act.

Approximately fifteen of INGAA's member companies currently purchase natural gas produced in the offshore Louisiana area; and, from time to time, each is required to construct offshore pipeline facilities, either individually or jointly with other pipelines, in order to attach new offshore reserves. Hence, each such member company is potentially subject to the imposition of a 60% load factor condition such as was imposed by the Commission upon Transco's certificate of public convenience and necessity at issue herein. As a consequence, INGAA's members have a substantial interest in the Court's disposition of Transco's Petition for Writ of Certiorari.

Because of the importance of the question to its member pipelines, INGAA participated as *amicus curiae* in support of Transco's petition for rehearing in the court of appeals.

INGAA has reviewed Transco's petition for writ of certiorari and concurs in the arguments set forth therein. In this brief, INGAA wishes to emphasize certain points of special concern to the industry as a whole.

ARGUMENT

I. Resolution Of The Question Will Have An Important Impact On The Development Of Domestic Energy Resources

The specific issue decided by the court of appeals in this case is "whether this [60%] condition attached to this certificate is 'reasonable' and required by the 'public convenience and necessity.' " 589 F.2d at 190. Restated in the broader terms of its impact on INGAA's member pipelines, however, the question is whether the Commission can use its power to condition certificates as a vehicle to deny pipelines the opportunity to recover from their customers their costs prudently incurred pursuant to Commission certificates. INGAA believes that this question is of such importance to the gas pipeline industry and the future course of domestic energy development that this Court should grant the writ.

There can be little doubt that the decision of the court of appeals, if allowed to stand, raises the specter of serious adverse financial consequences for interstate pipeline companies. However, of even greater importance to the nation is the counterproductive impact which such a decision will have on the future course of domestic energy development. No prudent management can be expected to commit its funds to projects for which a loss of the investment has been virtually guaranteed. By the same token, no financial institution can be expected to provide the necessary financing for a project which poses such a serious risk to the borrower's ability to service and repay the debt capital. The adverse consequences to the nation's efforts to increase its reliance on domestic energy resources are obvious. Clearly, this is no time to impose, through

regulatory agency fiat, unreasonable restraints on timely development of domestic energy resources.

II. The Court Of Appeals' Assumption That The Pipeline Industry Finds The Commission's 60 Percent Condition Tolerable Is Erroneous

In its decision, the court of appeals ascribed some significance to the fact that there have been no other litigated cases involving Section 2.65(b) of the Commission's Statements of General Policy and Interpretations during the ten years since such policy was announced. 589 F.2d at 191, n. 6. On the basis of this observation, the court concluded that "[s]omehow the industry has been able to live with this regulation for the last ten years." *Id.* As the interstate gas transmission industry's trade association, INGAA believes that it is in a unique position to dispel any notion that the implementation of the Commission's 60% rule, under its latter-day interpretation as an ongoing capacity utilization requirement, is the least bit acceptable to or reasonable in the eyes of INGAA's membership.

For the first seven years of the policy's existence, from 1968 until 1975 when the *Trunkline* order [1] was issued, the natural gas pipeline industry had no reason to believe that the Commission's 60% load factor policy was anything but a one-time test of offshore facility utilization. Moreover, the 60% condition was applied to relatively few of the many offshore facilities certificated by the Commission during that period of time. Further, those few pipelines upon which the condition was imposed were confident that they would be able to satisfy the requirement of such a one-time capacity utilization test; and, the industry's experience with off-

[1] *Trunkline Gas Co.*, Docket No. CP75-273, 54 FPC 1087 (1975).

shore facilities has proven that such confidence was justified. Thus, it is readily understandable why the Commission's 60% utilization policy was not viewed generally in the industry as a significant or intolerable burden.[2]

By way of contrast, the pipeline industry considers the Commission's post-1975 interpretation of the 60% condition as an ongoing requirement to be an extremely serious matter. If the 60% condition is upheld and if the Commission imposes the condition in offshore construction certificates issued in the future, such action would result in significant adverse financial consequences for the individual member companies of INGAA. Moreover, as indicated above, the magnitude of the adverse financial consequences which result from an interpretation of the 60% condition as an ongoing requirement would be exacerbated by the recent trend which reflects that the newer offshore fields are being produced and depleted in shorter periods of time, thus hastening the time by which offshore pipeline facility utilization will fall below the 60% level. Pipelines are virtually powerless to control or to remedy this situation.

Also of great concern to INGAA's members is the fact that the decision below contravenes well-settled principles of public utility ratemaking which assure pipelines of the opportunity to recover their prudent costs.[3] Under Sections 4 and 5 of the Natural Gas Act, pipelines are entitled to the opportunity to recover

[2] We do not mean to suggest, however, that there was any agreement in the industry with the proposition that a one-time test constituted a lawful exercise of the Commission's authority.

[3] See, Transco's petition for writ of certiorari, pp. 14-15.

their prudent costs; the Commission cannot subvert such opportunity under the guise of a Section 7 certificate condition. INGAA respectfully submits that the 60% rate condition, particularly under the Commission's recent interpretation of the condition as an ongoing requirement, is unreasonable, illogical and unlawful.

INGAA respectfully submits that there is no rational justification for the imposition of financial penalties on pipelines simply because they have constructed the facilities necessary to attach new offshore gas fields, which facilities the Commission has determined to be "required by the public convenience and necessity." Such financial penalties deprive pipelines of the opportunity to recover their prudent expenditures and are, therefore, clearly unlawful under the Constitution and the Natural Gas Act.

CONCLUSION

INGAA respectfully submits that this Court should grant the writ of certiorari.

Respectfully submitted,

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